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In The Supreme Court of The United States

October Term, 1964

No. 941

MYLES STEWART, Trustee of the Estate of Arthur Peabody and Olive Peabody,

PETITIONER

v.

PHOENIX TITLE & TRUST COMPANY,

RESPONDENT.

Opposing Brief to Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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Respondents oppose the granting of the Writ of Certiorari prayed for in the Petition seeking a review of the Judgments entered by the United States Court of Appeals for the Ninth Circuit on October 21, 1964 for the reasons set forth below.

OPINIONS BELOW

Petitioner's designation of the opinions below are not opposed.

JURISDICTION

This Court has jurisdiction of the Petition by virtue of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

PETITIONER'S QUESTION 1.

Does the unrecorded collateral assignment or a first beneficial interest in a passive real estate trust give the assignee a position "substantially equivalent to a mortgage" under a conventional mortgage and, therefore, take precedence over a later filed United States tax lien?

Hoare v. United States,
9th Cir., 294 F.2d 823 at 825.

Respondent in opposition to the above and foregoing question, answers the question in the affirmative.

Sec. 6323(a) Internal Rev. Code of 1954 (Title 26 U.S. Code) provides:

> Section 6323-VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.(a) Invalidity of Lien Without Notice.-Except as otherwise provided in subsections (c) and (d), the the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate.
> Source: Sec. 3672(a) 1939 Code.

Regulations promulgated by the Commissioner of Internal Revenue, under authority of Title 26 U.S. Code relative to Sec. 6323(a) provides as follows:

> Regulations:
> Sec. 301.6323-1. Validity of lien against mortgagees,

pledgees, purchasers, and judgment creditors. (a) Invalidity of lien without notice. (1) Filing of notice. The lien imposed by sec. 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice of lien has been filed. (See, however, section 6323(c) and paragraph (b) of this section, relating to the circumstances under which the lien is not valid with respect to a security even though notice thereof is duly filed.) The place for the filing of the notice of lien is –

* * *

(2) Meaning of terms. (i) As used in section 6323 and this section–

* * *

(ii) The determination whether a person is a mortgagee, pledgee, purchaser, or judgment creditor, entitled to the protection of section 6323(a), shall be made by reference to the realities and the facts in a given case rather than to the technical form or terminology used to designate such person. Thus, a person who is in fact and in law a mortgagee, pledgee, or purchaser will be entitled as such to the protection of section 6323(a) even though such person is otherwise designated under the law of a State, such as the Uniform Commercial Code.

It has been held under Sec. 6323(a) (above) and the regulations thereunder that the meaning of the word "mortgage" is a Federal question as to which State Law is to be considered, but is not controlling.

Hoare v. United States,
294 F.2d 823 (9th Cir.) at p. 825.
Hammes v. Tucson Newspapers, Inc.
324 F.2d 101 (9th Cir.) at p. 103.

See in this connection:

In The Matter of the Estate of Bennie Walton, Dec., United States of America, Appellant v. Ray E. Trussell, as Commissioner of Hospitals of the City of New York, Respondent.

PETITIONER'S QUESTIONS 2 & 4.

2. Can a Trustee in Bankruptcy under Sections 70(e)(1) at the time of adjudication assert the same position as the Federal government for the benefit of the Federal government and general creditors, and set aside an inchoate lien?

4. Is a lien, which is inchoate and void as to the United States government under Sec. 6323 of the Internal Revenue Code of 1954, also void and inchoate as to a Trustee in Bankruptcy under Section 70(c) and Section 70(e) (1) of the Bankruptcy Act?

Respondent in opposition to the above and foregoing questions, answers both questions in the negative for the following reasons:

The Trustee in bankruptcy may not invoke 70(e) of the Bankruptcy Act with powers which are referable to the sovereign government. Especially to those powers reserved to the Internal Revenue Service.

Silverman v. Wedge
158 NE 2d 668.

In The Matter of F.A. Whitney Carriage Company,
173 F.Supp. 709.

PETITIONER'S QUESTION 3.

Is an unrecorded mortgage of real property or an unfiled mortgage of personal property inchoate as to a subsequently recorded tax lien of the United States of America, that attached prior to the time of the filing of a Bankruptcy Petition?

Ariz. Revised Statutes,
Sections 1-215(22), 33-753(5).

Respondent in opposition to the above and foregoing question, answers the question in the negative for the following reasons:

The status of mortgages and liens under Sec. 6323(a)

IRC 1954, is a Federal matter as set out in answer to question 1 above. This is also the case with Chattel Mortgages:

"The execution and delivery of the chattel mortgage here involved antedated the filing of the federal tax lien. Under the express terms of Section 6323(a) of the Internal Revenue Code of 1954 it is, therefore, superior to such tax lien. The specific language of Section 6323 indicates that Congress intended federal tax liens to rank behind the specific categories of interests therein set forth, which are 'any mortgagee, pledgee, purchaser or judgment creditor.' 'Neither does the fact that the instrument was not recorded under the State's fraudulent conveyance statutes—thus to impart constructive notice to subsequent purchasers, mortgagees and the like—make any difference here, for the instrument was valid between the parties to it, and Congress, by Sec. 3672(a) expressly subordinated federal tax liens to antecedent mortgages.' United States v. R.F. Ball Construction Co., Inc., et al, 355 U.S. 587, 594, 78 S.Ct. 442, 446, 2 L.Ed.2d 510. (The quoted statement is taken from the dissenting opinion by Mr. Justice Whittaker, and is not at variance with any expressed statements of the majority.)

The chattel mortgage here involved was valid as between the parties to it and it antedated the filing of the federal tax lien. There is no requirement in Section 6323 that the mortgage, to be included in the specific category of interest set out therein, be filed prior to the filing of the federal tax lien. Said federal tax lien is specifically and expressly subordinated to the chattel mortgage.

'In Section 6323, Congress attempted to give a measure of protection to mortgagees, pledgees, purchasers and judgment creditors against Government tax liens. * * * Section 6323 provides that the tax lien imposed by Section 6321 shall not be valid 'against any mortgagee' until notice thereof has been filed. Section 6323 makes no reference to the matter of re-

cording. On its face it would appear that Section 6323 only requires that the mortgage be executed before the notice of federal tax lien has been filed.' Mason City and Clear Lake R.Co. v. Imperial Seed Co., et al., D.C., 152 F.Supp. 145, at pages 155, 156 & 157. This is consistent with the thinking of the Court of Appeals for the Fifth Circuit in the case of United States v. R.F. Ball Construction Co., 239 F.2d 384, which case was reversed by the Supreme Court solely on the question of whether the instrument there involved was a 'mortgage' within the meaning of that term as used in said Section 6323."

Gauvey v. Basin Rig & Trucking, Inc.
185 F. Supp. 374.

PETITIONER'S QUESTION 5.

Can there be imposed upon the rights of the United States government under a properly recorded tax lien the theory of inquiry-notice as it might affect other unsecured creditors of the bankrupts?

Respondent in opposition to the above and foregoing question, answers the question in the affirmative for the following reasons:

Sec. 6321 IRC 1954 (Title 26 USC) provides:

Sec. 6321. LIEN FOR TAXES. "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Source: Sec. 3670, 1939 Code.

Since the lien herein is against all rights to property of a taxpayer, it is a general Federal lien, while creditors' liens arise under and by virtue of special state statutes, within the jurisdiction of the respective states.

"Statutory Liens cannot be extended by the Courts to cases not provided by statute."

Fishback v. Foster,
202 P.806, 23 Ariz. 206.

Recorded Instruments are Notice of the contents thereof to everyone including the United States of America.

"It being established that the record title was in the Title & Trust Co., it follows that all creditors were creditors with notice of the fact that Owens and his associates were not the owners of the Tract, at least so far as the record was concerned, which is notice to all the world."

Barringer v. Lilley,
96 F.2d 607 (9th Cir.)

"Public records are notice to any person of the existence and contents of properly recorded instruments."

Bailey v. Kuida,
213 P.2d 895, 69 Ariz. 357.

CONCLUSION

For the reasons set out above, the Writ should be denied.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, J. MERCER JOHNSON, the attorney of record in this Court for PHOENIX TITLE & TRUST CO., the Respondent herein, depose and say that on the 22 day of March, 1965, I served a copy of the foregoing Opposing Brief to Petition For A Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit by delivering the same to the receptionist in the offices of HIRSCH, VAN SLYKE, RICHTER & OLLASON, located at 182 North Court St., Tucson, Arizona, counsel of record for MYLES STEWART, Trustee of the Estate of ARTHUR PEABODY and OLIVE PEABODY, Petitioner herein.

J. Mercer Johnson
J. MERCER JOHNSON

Subscribed and sworn to before me at Tucson, Arizona, this 22 day of March, 1965.

E. Ramirez
Notary Public

My Commission Expires:
October 20, 1968